111-597

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 366.

THE GIBBS AND STERRETT MANUFACTURING COMPANY, PLAINTIFF IN ERROR,

vs.

PETER BRUCKER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

FILED OCTOBER 10, 1881.

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1 Circuit Court of the United States for the Eastern District of Wisconsin.

UNITED STATES OF AMERICA, }
Eastern District of Wisconsin, } *ss:*

At a special term of the circuit court of the United States of America for the eastern district of Wisconsin, begun and held at the city of Milwaukee, in the said district, on the second Thursday (being the fourteenth day) of July, A. D. 1881.

Present: The Honorable John M. Harlan, Associate Justice of the Supreme Court of the United States, assigned to this circuit, presiding, and the Hon. Charles E. Dyer, district judge; Henry Fink, marshal; Edward Kurtz, clerk.

Among other, the following proceedings were had, to wit:

GIBBS AND STERRETT MANUFACTURING COMPANY, Plaintiff,
vs.
PETER BRUCKER AND PIRMIN KOEPFER, Defendants. } At Law.

Be it remembered, that heretofore, to wit, on the twenty-ninth day of December, A. D. 1879, came the above-named plaintiff, by its attorneys, Messrs. Finches, Lynde & Miller, and filed its *præcipe* for a summons against the above-named defendants, as follows:

2 *Præcipe for Summons.*

In Circuit Court of the United States, Eastern District of Wisconsin.

GIBBS AND STERRETT MANUFACTURING COMPANY, Plaintiff,
vs.
PETER BRUCKER AND PERMIN KOEPFER, Defendants.

The clerk of said court will issue a summons in the above-entitled action for the recovery of money only upon contract, for the sum of $4,664.49, with interest thereupon at seven per cent. per annum from and since the 4th day of December, A. D. 1879. Complaint filed, but not served.

Dated Dec. 29, 1879.

Yours, &c., FINCHES, LYNDE & MILLER,
Plaintiff's Attorneys.

And also filed bond for costs approved by the clerk.

Whereupon a summons issued returnable according to law, as follows:

3 *Summons.*

Circuit Court of the United States for the Eastern District of Wisconsin.

GIBBS AND STERRETT MANUFACTURING COMPANY, Plaintiff,
[SEAL.] *vs.*
PETER BRUCKER AND PIRMIN KOEPFER, Defendants.

The President of the United States of America to the said defendants:

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend the above-entitled action in the court aforesaid; and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint.

The sum for which judgment will be demanded in the complaint is four thousand six hundred and sixty-four dollars and forty-nine cents, with interest from December 4th, A. D. 1879, at 7 per cent. per annum.

The marshal of said district is hereby commanded to serve this summons, and make due return thereto.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of Milwaukee, in the said eastern district of Wisconsin, this 29th day of December, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States the 104th.

EDWARD KURTZ, *Clerk.*

FINCHES, LYNDE & MILLER,
Plaintiff's Attorneys.

P. O. address, Milwaukee, Wis.

4 *Return to Summons.*

Summons returned: "Served on the within named Pirmin Koepfer, at the city and county of Fond-du-Lac, Wis., by showing him this summons, and by delivering to him personally a copy thereof, this 31st day of December, A. D. 1879. Served on the within named Peter Brucker, at the town of Empire, Fond-du-Lac Co., by leaving a copy of this summons at his usual place of abode, in presence of a member of his family of suitable age and discretion, (his wife,) whom I informed of the contents thereof, he not being found, this 31st day of December, A. D. 1879.

"Fees, $9.04. HENRY FINK, *Marshal.*
"By M. W. SIMMONS, *Deputy.*"

And, same day, (December 29, 1879,) filed its complaint, as follows:

Complaint.

In Circuit Court of the United States, Eastern District of Wisconsin.

GIBBS AND STERRETT MANUFACTURING COMPANY, Plaintiff,
vs.
PETER BRUCKER AND PIRMIN KOEPFER, Defendants.

The plaintiff, in the above-entitled action, by Messrs. Finches, Lynde & Miller, its attorneys, complains of the said defendants, and alleges that it, the said plaintiff, on the first day of January, A. D. 1878, was and still is a corporation incorporated, duly organized, and existing under and by virtue of the laws of the State of Pennsylvania, with its principal or home office at the city of Corry, in said State of Pennsylvania.

That the said defendants, on said first day of January, A. D. 1878, were, and still are, citizens of the State of Wisconsin, and residents of the county of Fond-du-Lac, in said last-mentioned State.

And the said plaintiff further states that on or about the 23d day of January, A. D. 1878, the said plaintiff made and concluded an agreement with James Gibson, John Wirtz and Peter Fox, of the county of Fond-du-Lac and State of Wisconsin, of which the following is a copy, and the same is made a part of this complaint, viz.:

This agreement, made this 11th day of January, 1878, between the Gibbs and Sterrett M'f'g Co., of Chicago, Ills., party of the first part, and James Gibson and John Wirtz, of Fond-du-Lac, county of Fond-du-Lac, Wis., and Peter Fox, of Calvary, county of Fond-du-Lac, all in Wisconsin, parties of the second part, witnesseth:

That said party of the first part have this day appointed, and by these presents do appoint, said party of the second part their agents for the season of 1878, for the sale of the "Climax Mowers and Reapers," the said agency to extend over and in the following territory, as follows, viz.: The towns of Eldorado, Lamartin, Friendship, Calumet, Marshfield, and Taycheedah, in the county of Fond-du-Lac; the west half of the county of Sheboygan and the county of Calumet; the county of Calument and the two northern towns in Sheboygan county are conditional, the same having been contracted and ceded to Kurtz & Boendel, of Holstein, Wis. If first parties can make satisfactory arrangements, or conclude to revoke the contract of K. & B., then the territory in this contract is as above, otherwise the exceptional territory is not included.

2d. In consideration of said agency the party of the second part agrees to guarantee the sale of all machines ordered by them; to canvass the territory above named, and make all reasonable efforts to sell said Climax self-raking reapers, Climax droppers, and Climax mowers in the above-named territory, by putting up and exhibiting samples, and by distributing such printed matter as may be furnished by the said Gibbs & Sterrett Manufacturing Co.

3d. It is agreed by the parties hereto that all machines ordered

by the second party shall net the first party the following prices on board cars or boat at Chicago, viz.:

7	4-feet mowers	$75 00
	4½-feet mowers	75 00
	Mowers, combined with center cut, self-rake attachment	138 75
	Mowers, combined with dropper attachment	
	Center cut, self-rake attachment	63 75
	Dropper attachment	

And all over and above the said net prices which the second party may receive shall belong to said second party, and may be retained by them proportionately in cash and notes, as the same may be received, and the remainder forwarded to the first party; the amount thus due the second party shall be in full for all expenses, charges, and demands whatsoever of the second party.

4th. The second party agrees to sell said machines on the following terms, viz.: One half payable in cash, or notes due Nov. 1st, 1878, and the other half in notes due Nov. 1st, 1879, and that in no case shall the time of the last payment be extended beyond January 1st, 1881.

5th. The second party further agrees that all notes taken for machines sold under this contract shall be made on the blanks of the first party, and be payable to the order of said first party at the nearest bank or express office, and bear interest at 7 per cent. per annum, and that the property statement on the back of said
8 notes shall be properly filled out and signed by the makers or endorsers thereof.

6th. The second party further agrees to endorse and guarantee the payment of every note taken by them on which the property statement does not show the makers or endorsers thereof to be worth $1,000 or more, clear of all liabilities and exemptions.

7th. The second party further agrees to use due diligence in obtaining settlement for all sales made by him, and in no case to allow a machine to be used to a greater extent than is allowed by the printed warranty of the first party, unless the sale of the machine is confirmed.

8th. The second party further agrees to keep a correct account of all machine sold, separate and apart from his other accounts; to keep all account books, notes, or drafts relating to same, subject to the use and inspection of said first party or their general agent, attorney, or assigns.

9th. The second party further agrees, in all cases where they sell machines, to have orders filled out with property statement of purchaser and signed by same; and further agrees to set up and start all of said machines when sold, and at all times remedy every complaint in their power, and to be governed by the instructions on back of this contract, which are made a part of same.

10th. The second party further agrees to receive all machines which he may order, pay freights on same, and keep them prop-

erly stored under cover and in good order, to exhibit the same as publicly as possible, and not to use, or permit them to be used, except when necessary in making a sale.

11th. The second party further agrees to forward to the first party, at Chicago, Ill., during the time of selling said machines, weekly report of sales, showing the number of machines sold and the terms of sale, and remit with each report the proportion of cash and notes due said first party for all machines sold; also, to collect said notes free of charge, when returned to them for that purpose, and forward the money by express, or by draft, as may be directed by said first party.

12th. The second party further agrees to pay the first party for all machines in their hands at the close of the season, at the net prices hereinbefore set forth, by their notes, payable one-half October 1st, 1879, and the other half January 1st, 1880, said notes to bear interest at 7 per cent.

13th. It is further agreed that it shall be optional with the first party, at the time of settlement, under this contract, whether they will receive the notes of the second party, as hereinbefore provided, in payment for the machines unsold and remaining in the hands of said second party, or retain in themselves the ownership of said machines. In case the first party elects to retain the ownership, then the second party agrees to continue to care for, house, protect, and hold said machines, subject to the order of said first party, and to deliver said machines upon their order, free of all expense, charges, or demands whatsoever.

14th. It is further agreed that this appointment be, and the same is hereby, made revocable at the pleasure of said party of the first part.

15th. The said party of the second part further agrees to receive, pay transportation on, and take proper care of all extra parts shipped to him, and at the close of the season's business to pay cash for all sold by him, less a discount of 25 per cent. from list price.

16th. It is further agreed and understood that a settlement between the parties hereto under this contract shall be made at any time after the first day of September that the first party may elect.

JAMES GIBSON.
JOHN WIRTZ.
PETER FOX.

In presence of—
M. V. MATTESON.

Instructions, making Part of the within Agreement.

To JAMES GIBSON, JOHN WIRTZ, and PETER FOX, *Agents:*

1st. Order no more machines than you have reasonable belief can be disposed of, so that no machines will be left on hand at the close of the season.

2d. We agree to put machines and extras on board of cars or boats at Chicago, free of charge. Freight charges will follow, and be payable at destination.

11 3d. In case the exclusive right of sale is granted you in this contract for certain territory, you agree that you will not be interested in the sale of other combined reapers; otherwise we reserve the privilege of selling to other parties.

4th. You must see that every machine sold by you is properly set up and started in the field. Every machine is put together and run by us before leaving the factory; hence, if the same fails in the field, it will arise from not being properly started when sold. Should you fail to make the same work satisfactorily, you will notify us by mail or telegraph (as the emergency of the case may demand), and we will send a competent man to remedy the defect; should it then fail, we will take it back. But in no case will you allow a machine to be returned without seeing it properly operated in the field. All expenses incurred by us, resulting from your negligence or failure to comply fully with these instructions, will be charged to you and be deducted from your commissions in settlement.

5th. At all times sell for as much cash in hand as possible. You may deduct five per cent. from all second payments under this contract that are received in full in cash on or before October 1, 1878.

12 For value received, we hereby guarantee the fulfillment of the contract on the part of James Gibson, Wohn Jirtz, and Peter Fox, and hereby join them in each and every obligation therein contained.

Fond-du-Lac, January 11th, 1878.

PIRMIN KOEPFER.
JACOB STEFFES.
PETER BROCKER.

And the plaintiff further states that the said *agreement was negotiated* by one M. V. Matteson, a special agent of this plaintiff, but who had no power or authority to close or conclude the same; that the same was made out in duplicate, one part or duplicate thereof was signed by said Gibson, Wirtz, and Fox, at Fond-du-lac, in the State of Wisconsin, on the day of the date thereof, to wit, January 11th, 1878.

And the plaintiff further states that said Gibson, Wirtz, and Fox were required by said agent of this plaintiff, M. V. Matteson, to furnish and give three sureties to said plaintiff on the part and behalf of them, the said Gibson, Wirtz, and Fox, as a condition of the acceptance of said proposed contract by said plaintiff, and to that end and for that purpose, as the said plaintiff is informed and believes, said defendants herein, (together with one Jacob Steffes, who is now deceased and therefore is not made a party to this action,) at the request of said Gibson, Wirtz, and Fox, in con-

13 sideration that said plaintiff would accept said proposed contract, and appoint them, the said Gibson, Wirtz, and Fox, such agents, as in said contract specified, made, signed, and executed upon the back and at the foot of said duplicate contract, which was so as aforesaid signed by said Gibson, Wirtz, and Fox,

this said guaranty of said contract, in words and figures following, viz:

"For value received we hereby guarantee the fulfillment of the contract on the part of James Gibson, John Wirtz, and Peter Fox, and hereby join them in each and every obligation therein contained.

"Fond-du-Lac, Jan'y 11th, 1878.

"(Signed) PERMIN KOEPFER.
" JACOB STEFFES.
" PETER BROCKER."

And this plaintiff further states that said guaranty, so written, signed, and executed by said defendants herein, was afterwards (together with both of said duplicate contracts) delivered by said defendants to this plaintiff for the purposes aforesaid, and that this plaintiff afterwards, in consideration of the premises, accepted said guaranty and ratified and concluded said contract, signed the other of said duplicates, and on the 23d day of January, A. D. 1878, delivered to said Gibson, Wirtz, and Fox the other said duplicate so by this plaintiff signed and executed, and retained in its pos-
14 session the aforesaid duplicate with said guaranty thereupon so executed by said defendants; and that there is no other company or corporation besides this plaintiff at Chicago, Illinois, or elsewhere, named Gibbs and Sterrett Manufacturing Company, and that this plaintiff has a western branch at Chicago, and therefore said contract describes this plaintiff as of Chicago, Illinois.

And the plaintiff further states that after the execution and delivery to it of the aforesaid guaranty, and after the delivery as aforesaid of said duplicate contract to said Gibson, Wirtz and Fox, the said agents, Gibson, Wirtz, and Fox, entered upon the performance of said agreement upon their part, and between the said 23d day of January, A. D. 1878, and the first day of September of the same year, the said plaintiff, at the request and upon the order of said Gibson, Wirtz, and Fox, delivered to them, said Gibson, Wirtz, and Fox, under and upon said contract, to be sold and accounted for as therein specified, a large number of machines specified in said contract, to wit, Climax mowers and reapers, and a large amount of so-called "extras," being single or extra parts of such machines or other articles of necessity or convenience for the keeping in repair or successful working of such machines.

And the said plaintiff further states that the following is
15 an inventory or list of the said property so delivered by said plaintiff to said Gibson, Wirtz, and Fox under said contract, with about the dates of delivery and the value of the property so delivered, at Fond-du-Lac, Wisconsin, where the same was so received by said agents, Gibson, Wirtz, and Fox, viz.:

1878.

March 11.	Three combined center-cut reapers, each of the value of $181, in all	$543 00
March 11.	One mower, 4-foot cut, of the value of	96 00

1878.			
March	21.	Ten combined center-cut reapers, each $181, total	$1,810 00
June	14.	Three combined center-cut reapers, ea. $181, total	543 00
June	20.	Twenty combined center-cut reapers, ea. $181, total	3,620 00
July	9.	One mower, four-foot cut, of the value of	96 00
		Two combined center-cut reapers, had by them of Briggs on the plaintiff's order, each of the value of $181, total	362 00
		In all of the total value of	$7,070 00

"Extras."

1878.			
June	17.	Two hundred and sixty-five pieces, consisting of small castings, &c., among others, hinge castings, pitman sleeves, bevel pinions, &c., &c., in all of the value of	173 65
June	20.	Thirty-two pieces, similar, consisting of smooth knives, joint arms, &c., &c., of the value of	39 00
June	30.	Twenty-five pieces of similar extras, of the value of	8 60
Aug.	1.	Fourteen pieces of similar extras, of the value of	26 00
Aug.	2.	Thirty pieces of similar extras, of the value of	9 60
Aug.	3.	Twenty-five pieces of similar extras	39 80
16			
Aug.	6.	Two goose-neck guides, of the value of	1 00
Aug.	26.	Eleven pieces of similar, extras, of the value of	11 45
		Amounting in value in the whole to the sum of	$7,379 10

And this plaintiff further states that the said agents, Gibson, Wirtz, and Fox, disregarding their said promises and undertakings in said contract contained, after their receipt of the property aforesaid, neglected and refused to sell the said property upon the terms or conditions in said agreement contained, and, without the knowledge or consent of this plaintiff, sold and disposed of many of said reapers in exchange for other property, some of said reapers for cash in hand, at much below the prices named in said contract; some, also, of said reapers for the notes of the purchasers, running a year longer, and in some instances a year and a half longer than provided in said contract; and that said Gibson, Wirtz, and Fox did not, and would not, during the time of selling said machines, or at any other time, forward to Chicago, Illinois, weekly or other

reports of sales, nor did they remit during said selling season, or at any time, to said plaintiff any cash, or any notes, or any other property or thing so taken and received by said Gibson, Wirtz, and Fox for or in exchange for said machines and property so sold, traded off, and disposed of.

And the plaintiff states that on or about the first day of
17 September, A. D. 1878, this plaintiff, by its duly authorized agent, demanded of said Gibson, Wirtz, and Fox, at Fond-du-Lac aforesaid, that they settle with this plaintiff then and there, of and concerning the said contract, and as to all the property so delivered to them by this plaintiff, as aforesaid, under said contract, and that they pay over to the plaintiff the proceeds thereof, according to the terms and provisions of said agreement; but that said Gibson, Wirtz, and Fox then refused to make any settlement with this plaintiff, and from thence hitherto have and still do refuse to come to or make any settlement with this plaintiff as to or concerning their said agency, and have kept, retained, and converted to their own use all of said machines and property so to them, as aforesaid, delivered, excepting the following, which this plaintiff has at different times received and recovered back from them and others, in whose possession the same was found by this plaintiff afterwards to be, viz.:

1878.			
May	14.	One combined center-cut reaper, @	$181 00
June	29.	One combined center-cut reaper, @	181 00
August	31.	One mower truck, @	52 49
July	3d.	One combined center-cut reaper, damaged	135 00
July	3d.	"Extras," consisting of castings, wheels, knives, &c., to the amount and value of	227 00
July	3.	Pitman rod and hook, gag-lever, &c.	5 00
18			
July	3.	One rake-head cam	2 62
Oct.	8.	Cash of Mrs. Petrie, balance on machine	130 00
Sept.		Note of C. Adrian; date, Aug. 17, 1878	40 00
Do.		Note of Fred'k Hosmer; date, July 20, '78	40 00
The above together making a sum total of nine hundred and ninety-four dollars and eleven cents			$994 11
Also one mowing attachment of the value of			10 00

The plaintiff further, upon information and belief, states that the above is the only amount, and that the above are the only articles of property ever by said Gibson, Wirtz, and Fox returned, paid, or delivered to this plaintiff under said contract.

That this plaintiff afterwards, and on or about the fourth of December, A. D. 1879, obtained from the above-named defendant, Peter Brocker, on account of said contract, the sum and amount of seventeen hundred and ten dollars and fifty cents ($1,710.50), partly in notes of purchasers of some of said machines, and partly in money which had been paid by other purchasers of other of said machines, and

except as above stated nothing has ever been paid or delivered to this plaintiff in payment for, or to be applied in payment or satisfaction in any way of the aforesaid demand of this plaintiff against said Gibson, Wirtz, and Fox, and that all of the said property, machines and extras, except as above stated, has and have
19 been by said Gibson, Wirtz, and Fox, before the commencement of this action, converted to their own use.

And the plaintiff further states, that on or about the 15th of September, 1878, it, by its duly-authorized agent, notified said defendants of the failure and refusal of said Gibson, Wirtz, and Fox to keep and perform said contract, and then demanded of them, the said defendants, that they fulfill and perform the same, and then notified said defendants of the amount of this plaintiff's claim against said Gibson, Wirtz, and Fox, but that said defendants have not hitherto fulfilled or performed said contract, nor have they, said defendants, or either of them, nor did their, co-surety Steffes, in his lifetime, ever pay or deliver to this plaintiff any money, property, or thing upon or in payment of said contract, except as above stated; and that said defendants are now justly indebted, upon their said guaranty, to this plaintiff, in the sum of four thousand six hundred and sixty-four dollars and forty-nine cents ($4,664.49) with interest thereupon from and since the fourth day of December, A. D. 1879.

Wherefore, this plaintiff demands judgment against said defendant for the said sum of four thousand six hundred and sixty-
20 four dollars and forty-nine cents, with interest thereon from and since December 4th, A. D. 1879, together with the costs of this action.

FINCHES, LYNDE & MILLER,
Pl'ff's Att'ys.

STATE OF WISCONSIN, } ss:
Eastern District of the State of Wisconsin, County of Milwaukee, }

Elias Beach, being duly sworn, says he has heard the above complaint read and knows its contents thereof, and that the same is true to his own knowledge, except as to the matter therein stated on information and belief, and as to those matters he believes it to be true.

And this deponent further says that he is the general western manager and agent of said plaintiff, and makes this verification on its behalf and by its authority. That this affiant has the possession and control of said contract in said complaint mentioned, and has read the same and the said guaranty, and the same is now before him. That this affiant was at Fond-du-Lac, Wisconsin, on or about the first day of September, 1878, and remained there over four weeks looking up the matter of said agency with Gibson, Wirtz, and Fox, and then saw and had many interviews with said agents and said defendants herein, and from such interviews and state-
21 ments to him made by said defendants, and the knowledge had by this deponent of shipping said machines, he believes said complaint is true as to the matters therein stated upon informa-

tion and belief, and as to the matters therein stated positively, his means and grounds of knowledge are that he shipped said property to said agents, and has personal knowledge that they received the same, as well as that they only returned the property and amounts specified in said complaint.

ELIAS BEACH.

Subscribed and sworn to before me, the 27th day of December, A. D. 1879. Witness my hand and official seal.

[SEAL.] WILLIAM H. MORRIS,
Notary Public, Milwaukee County, Wisconsin.

November 22, 1880. This day came the parties, by their counsel, and on application of the defendants for a continuance of this cause and affidavits filed, it is ordered by the court that this cause be, and hereby is, continued, and that the same be placed upon the calendar for trial at the January term without further notice.

March 10, 1881. This day came the defendant, Peter
22 Brucker, by his attorney, Mr. E. S. Bragg, and filed his answer as follows:

Answer of Def't Peter Brucker.

In Circuit Court of the United States for the Eastern District of Wisconsin.

GIBBS AND STERRETT MANUFACTURING COMPANY
vs.
PETER BRUCKER, impleaded with PIRMIN KOEPFER.

Peter Brucker, who is one of the defendants in this action, by Edward S. Bragg, his attorney, comes into court, and for answer to the complaint in this action, alleges:

That it is not true that the "Gibbs and Sterrett Manufacturing Company," the supposed plaintiff in this action, was, on the first day of January, 1878, or at any other time, a corporation duly incorporated, organized, and existing under and by virtue of the laws of the State of Pennsylvania, or a corporation having an organization or existence at all.

And for a second and further answer, the defendant alleges that he is informed and believes that the said supposed contract in the plaintiff's complaint was signed and delivered by James Gibson, John Wirtz, and Peter Fox, and became in full force, so far as it might legally become in force as to them, upon the eleventh day of
23 January, 1878, and not upon the twenty-third day of January, 1878, as is in said complaint stated and alleged.

And this defendant admits that he signed the guaranty upon the back thereof, but he says that he signed the same, and so far as he was connected therewith, delivered the same, upon the day of the week commonly called Sunday, and that he never at any time thereafter redelivered the same or acknowledged the binding effect

thereof upon him, and that the said supposed corporation well knew when the said paper was received, that the same was executed and delivered on Sunday, and was null and of no force and effect by reason thereof upon this defendant.

And this defendant, for a third and further answer, alleges that at the time he signed the said guaranty declared upon in the said complaint of the said supposed plaintiff, it was represented to him, and, as he is informed and believes, with the knowledge and assent of the said supposed plaintiff, that one Jacob Steffes, a responsible person, had previously signed and executed the same, and, trusting to such representation, he was induced to sign the same, which he would not have done had he known such representation to be untrue.

And he alleges and charges on information and belief that
24 the signature of the said Joseph Steffes attached to said guaranty, and on the faith of which he signed the same, was not his signature, but was, in fact, a forgery.

And the defendant, for a fourth and further answer, alleges that he is informed, and upon information and belief admits, that John Wirtz, James Gibson, and Peter Fox, some one, both, or all of them, received property to a considerable amount from a person, firm, or corporation styling itself "Gibbs and Sterrett Manufacturing Company," of Chicago, Illinois; but whether the said party was a corporation, this defendant has not sufficient knowledge or information sufficient to form a belief; and to what amount and of what value, and whether furnished under the said supposed contract or in accordance with its terms, this defendant has not sufficient knowledge or information to form a belief.

And defendant further alleges that he has not knowledge or information sufficient to form a belief, whether the amount, kind, and value of the property furnished the said Gibson, Wirtz, and Fox, either, both, or all of them, is correctly stated in the said complaint, or whether the payment or credits allowed in the said complaint are the true and proper payment and credits which the said Gibson, Wirtz, and Fox made or are entitled upon the said supposed contract, or whether their property was so delivered to the said
25 Wirtz, Gibson, and Fox, either, all, or both of them, as purchasers or as agents.

And this defendant denies that he paid the said supposed plaintiff, on account of said contract, the sum of seventeen hundred and ten dollars and fifty cents, or any sum whatever; but he admits that, for and on behalf of John Wirtz, James Gibson, and Peter Fox, he did, on the 4th day of December, 1879, deliver and pay to one David Ordway, Esq., claiming to be the attorney and as the attorney for the said supposed plaintiff, in notes and cash the sum of seventeen hundred and ten dollars and fifty cents, to be applied for their use and benefit on the said supposed contract, and not otherwise.

And further answering, this defendant admits the death of the said Jacob Steffes, and that this defendant never paid or delivered

any property or money on account of said contract, except as hereinbefore stated.

And for a fifth and further answer the defendant alleges that of each and every allegation in the said plaintiff's complaint, not hereinbefore admitted, traversed, avoided, or denied, he has not knowledge or information thereof sufficient to form a belief.

Wherefore the defendant prays judgment, and that he be
26 hence discharged with his reasonable costs and charges.

EDW'D S. PRAGG,
Att'y for Def't.
Residence, Fond-du-Lac, Wis.

EASTERN DISTRICT OF WISCONSIN, *ss:*

Peter Brucker, being duly sworn, says that he is the defendant in the foregoing answer named, and has heard the same read, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters and things therein stated on his information and belief, and as to those matters and things he believes it to be true.

PETER BRUCKER.

Sworn and subscribed, this 24th day of February, 1880, before me—

[SEAL.] HENRY B. EASTMAN,
Notary Public, Fond-du-Lac County, Wis.

And afterwards, to wit, at a stated term of said court, begun and held according to law, on the first Monday (being the third day) of January, A. D. 1881—present and presiding, the Honorable Charles E. Dyer, district judge—and on the forty-ninth day of said term, to wit, on the 10th day of March, A. D. 1881, the following proceedings were had, to wit:

27 *First Trial.*

GIBBS AND STERRETT MANUFACTURING COMPANY
vs.
PETER BRUCKER AND PIRMIN KOEPFER. } At Law.

This day came the parties, by their counsel, Messrs. H. M. Finch and D. S. Ordway appearing for the plaintiff and Mr. E. S. Bragg for the defendant, Peter. Brucker, and the issue herein between the plaintiff and said defendant came on to be tried; and there not being sufficient jurors in attendance belonging to the regular panel, the counsel of the parties agreed in open court that talesmen might be summoned to complete the panel to try said issue.

Whereupon a jury was called to try the same, who came, to wit: John W. Eviston, William Gerlach, John Campbell, J. M. Holmes, F. F. Adams, John F. Birchard, and Henry Buestrin, of the regular panel, and John Martin, M. S. Barrett, E. W. Hincks, F. G. Adams, and Herman Boerngen, called as talesmen, twelve free, honest, and

lawful men of the district, who were severally sworn and impaneled, and the trial not being concluded, the same was adjourned until to-morrow morning.

And afterwards, to wit, on the fiftieth day of said term, to wit, on the eleventh day of March, A. D. 1881, the following proceedings were had, to wit:

28 This day came the parties, by their counsel, and the trial of the issue herein between the plaintiff and the defendant, Peter Brucker, was resumed, and not being concluded, the same was adjourned until to-morrow morning.

And afterwards, to wit, on the fifty-first day of said term, to wit, on the 12th day of March, A. D. 1881, the following proceedings were had, to wit:

This day came the parties, by their counsel, and the trial of the issue herein between the plaintiff and the defendant, Peter Brucker, was resumed, and not being concluded, the same was adjourned until Monday morning next.

And afterwards, to wit, on the fifty-second day of said term, to wit, on the 14th day of March, A. D. 1881, the following proceedings were had, to wit:

Verdict.

GIBBS AND STERRETT MANUFACTURING COMPANY
vs.
PETER BRUCKER AND PIRMIN KOEPFER } At Law.

This day came the parties, by their counsel, and the trial of the issue herein between the plaintiff and the defendant, Peter Brucker, was resumed, and the jurors of the jury aforesaid being charged by the court, upon their said oaths, respectively, do say that they
29 find the issue herein in favor of the plaintiff, and assess the damages to the said plaintiff at the sum of three thousand three hundred and thirty-six dollars and twenty-five cents.

And came the defendant, Peter Brucker, by his counsel, and moved the court for a new trial, for reasons filed, as follows:

Motion for New Trial.

In the Circuit Court of the U. S., E. District of Wisconsin.

GIBBS AND STERRETT MANUFACTURING COMPANY
vs.
PETER BRUCKER, impleaded with another.

And now comes the said defendant, Peter Brucker, by Edw'd S. Bragg, his counsel, and moves the court to set aside the verdict rendered in this action and to grant a new trial therein, and assigns for cause—

1st. That the court erred in not instructing the jury to find a verdict for the defendant.

2d. That the court erred in holding that the paper writing upon which the plaintiff declared, and which constitutes the sole cause of action stated or proven, was not a contract made on Sunday, or the Lord's day, so-called, and by reason thereof could not be made the basis for an action at law.

3d. That the verdict is contrary to the law and the evidence.

EDW'D S. BRAGG,
Att'y and of Counsel for Def't.

30 And now at this same term, to wit, July special term, A. D. 1881, and on the first day thereof, to wit, on the fourteenth day of July, A. D. 1881—present and presiding, the Honorable John M. Harlan, Associate Justice of the Supreme Court of the United States, assigned to this circuit, and the Honorable Charles E. Dyer, district judge—the following proceedings were had, to wit:

Argument of Motion for New Trial.

GIBBS AND STERRETT MANUFACTURING COMPANY
vs.
PETER BRUCKER AND PIRMIN KOEPFER. } At Law.

This day came the parties, by their counsel, and the motion of the defendant, Peter Brucker, for a new trial came on to be heard, and was argued by Mr. E. S. Bragg for said defendant and by Mr. D. S. Ordway for the plaintiff, and the hearing being concluded, the court held the same under consideration.

And afterwards, to wit, on the tenth day of said term, to wit, on the 25th day of July, A. D. 1881, the following proceedings were had, to wit:

Motion for New Trial Granted.

This day came the parties, by their counsel, and on consideration of the motion of the defendant, Peter Brucker, for a new trial, and the arguments of counsel thereon, it is ordered by the court that a new trial be, and hereby is, granted.

31 And afterwards, to wit, on the eleventh day of said term, to wit, on the 26th day of July, A. D. 1881, the following proceedings were had, to wit:

Second Trial and Judgment.

GIBBS AND STERRETT MANUFACTURING COMPANY
vs.
PETER BRUCKER AND PIRMIN KOEPFER. } At Law.

This day came the parties by their counsel, and the issue herein between the plaintiff and the defendant, Peter Brucker, came on to

be tried, when the said counsel entered into an agreement, as herein filed, waiving a jury, as follows:

"It is hereby stipulated that a jury be waived herein, and that this cause be tried before the court at this July term, without further notice.

"Dated July 26th, 1881.

"FINCHES, LYNDE & MILLER,
"Plaintiff's Att'ys.

"EDW'D S. BRAGG,
"Att'y for Def't, Brucker."

And the said issue was thereupon tried by the court and submitted. On consideration whereof, the court find the issue herein in favor of the said defendant.

Whereupon it is considered and adjudged by this court, now here, that the plaintiffs take nothing by their writ, and that the said defendant do have and recover of the said plaintiffs, Gibbs and Sterrett Manufacturing Company, sixty dollars and four cents,
32 his costs about his said defence in this behalf by him expended, and that he have execution therefor.

Judgment roll signed July 26th, A. D. 1881.

Costs, $60.04.

EDWARD KURTZ, *Clerk.*

And same day, (July 26, 1881,) certificate of division of opinion now ordered to be filed as follows:

Certificate of Division of Opinion.

In Circuit Court of the United States, Eastern District of Wisconsin.

GIBBS & STERRETT MANUFACTURING COMPANY, Plaintiff,
against
PETER BRUCKER, Defendant.

This cause having been tried by the court without a jury at this special July term, to wit, on this 26th day of July, 1881, before John M. Harlan, associate justice, and Charles E. Dyer, district judge, after consideration of the evidence and after hearing counsel the following facts are found:

1. That the plaintiff, at the time of and for more than three years next before the commencement of this action, was and had been a manufacturing corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, with its home
33 office at Corry, in said State last named, and having, during all of said time, a western branch or general agency at the city of Chicago, in the State of Illinois.

2d. That on and previous to the 11th day of January, 1878, Messrs. Hoag & Conklin, of Waterloo, Wisconsin, were agents of said plaintiff in and for the State of Wisconsin, and so continued to be such agents until after January, 1878, for the purpose of effecting sales of the manufactured articles of said plaintiff, (principally

reapers and mowers,) in the State of Wisconsin, through sub-agents to be appointed in the following manner: They, said Hoag & Conklin, were to canvass the State of Wisconsin for the purpose of selecting good and responsible men to become agents, and were to fill out in duplicate the said plaintiff's printed form of contract, a copy of which is set forth in the complaint in this action, and cause the same to be signed by the men selected by them to act as such agents, and their sureties, and immediately thereafter to forward said duplicates to the plaintiff, at its western branch, at Chicago, Illinois, for approval and signature of the said plaintiff, and that said Hoag & Conklin had no power or authority to sign or close any such contract on behalf of said plaintiff.

34 3d. That during all the time from January 10th until January 25th, 1878, and after, one M. V. Matteson was an employee and agent of said Hoag & Conklin, for the purpose of carrying out the aforesaid contract of Hoag & Conklin on their part, and had and exercised no other or greater or different powers in that regard than had or did said Hoag & Conklin.

4th. That said Hoag & Conklin were to be paid by the plaintiff by certain commissions upon the amount of machinery sold, and that said Matteson was to be paid by said Hoag & Conklin by commissions upon the amount of machinery so sold through agencies established by his labors.

5th. That on the 11th day of January, 1878, (which was Friday,) said Matteson filled out and procured to be signed by Gibson, Wirtz, and Fox, the agency contract set forth in the complaint in this action. The instrument of guarantee, at the foot thereof, upon which this action is brought, was then also filled out by said Matteson, and was by him required to be signed by three sureties, and the same was then, to wit, on Friday, January 11th, signed by the surety, Pirmin Koepfer, and the same, so signed, was delivered to said Peter Fox on said 11th day of January, for the purpose of obtaining the signature thereto of Jacob Steffes as a surety. That on Sunday forenoon, January 13th, said contract and guaranty were re-

35 turned by said Fox to said Wirtz, with the name Jacob Steffes signed to said guaranty, and Wirtz thereupon exhibited the same, so signed and perfected, (with the exception of the third surety,) to said Matteson, said Wirtz retaining the same for the purpose of procuring the third surety.

6th. Thereafter, on said Sunday, January 13, said defendant, Brucker, at the request of said Wirtz, signed said guaranty and delivered the same, so signed, to said Wirtz, to be delivered to Matteson; and that Wirtz delivered said contract and guaranty, so completed, to Matteson, in the afternoon of the same Sunday; and that Matteson knew that the guarantee was signed by the defendant, Brucker, on Sunday; and that Brucker, the defendant, then knew that Matteson was an agent, and was to take or send said contract and guaranty to Chicago.

7th. That said Wirtz, Gibson, and Fox then knew that Matteson had no authority to sign or close such contract on behalf of the

plaintiff, but that the same must be sent to the plaintiff at Chicago, to be accepted and signed.

8th. That said defendant, Brucker, then had no knowledge that said contract and guaranty must be so sent to Chicago for acceptance or signing, and that he then had no actual knowledge
36 as to what powers the agent, Matteson, had or was possessed of and made no inquiry concerning the same.

9th. That said Matteson, at Fon-du-Lac, Wis., on Monday, January 14th, 1878, mailed the said duplicate contracts and guaranty so signed as aforesaid to the plaintiff at Chicago in a letter of that date, asking that the same be signed and accepted by the plaintiff.

10th. That said duplicate contracts and guaranty were received by the plaintiff, in Chicago, by due course of mail, and were accepted and signed by the plaintiff, in Chicago, on the 23d day of January, 1878, which was Wednesday, and that on the said 23d day of January one of said duplicates, so signed by the plaintiff, was by mail returned to said Gibson, Wirtz, and Fox, at Fond-du-Lac, Wisconsin, and was by them received at said last-named place by due course of mail, and retained, but no communications were had between Brucker and the plaintiff on the subject.

11th. That thereafter, during the spring and early part of summer of 1878, the plaintiff delivered to the said Wirtz, Gibson, and Fox, upon said contract, a large number of reapers and mowers and other machinery, as stated in the complaint herein, and that default was made upon said contract by said Wirtz, Gibson, and Fox, and the defendant, as stated in the complaint herein, in all which re-
37 spects and complaint is true, and that there is now due to said plaintiff thereupon the sum of $3,336.25, with interest thereon at seven per cent. per annum from and since March 14, 1881, from said defendant Brucker, provided said guarantee contract is valid as against him.

12th. That neither said plaintiff, nor any officer or agent thereof, excepting said Matteson, ever had any notice or knowledge until after the signing of said contracts in Chicago, and until after the delivery of all of the said property thereupon as aforesaid to said Gibson, Wirtz, and Fox, that said instrument of guaranty was signed so as aforesaid and delivered by said defendant Brucker on the Lord's day.

Upon the foregoing facts the following is the conclusion of law as established by the opinion of the circuit justice, (who is opposed in opinion by the district judge,) to wit:

That said contract of guaranty and suretyship is void and invalid under and by virtue of the statutes of the State of Wisconsin, because the same was so signed and delivered by said defendant Brucker upon the Lord's day, and judgment is therefore ordered herein in favor of said defendant Brucker, with costs.

Upon the trial, and upon the facts aforesaid so found, a
38 question arose as to whether the said contract of suretyship so signed by said Brucker, was valid in law under the statutes of Wisconsin, and enforceable in this action against the defendant

Brucker, he having so signed and delivered the same as aforesaid upon the Lord's day; upon which question the judges of this court were divided in opinion.

It is, therefore, by request of both parties hereto, ordered that the said question be certified to the Supreme Court of the United States; that is to say, was and is the said guarantee contract valid and effectual and enforceable in this action against the said defendant Brucker, or is the same void as to him because so signed and delivered as aforesaid upon the Lord's day?

Dated July 26th, 1881.

JOHN M. HARLAN, *Circuit Justice.*
CHAS. E. DYER, *Dist. Judge.*

September 5, 1881. This day came the plaintiff, by its attorneys, and filed its bond with A. A. Aspinwall and B. K. Miller, as sureties, in the sum of three hundred dollars, conditioned to prosecute a writ of error to effect and answer all damages and costs, &c., if it fail to make its plea good.

Which bond is approved by the district judge, and is as follows:

39 *Bond for Costs on Writ of Error.*

Know all men by these presents, that we, The Gibbs and Sterrett Manufacturing Company, principal, and A. A. Aspinwall, of Corry, in the State of Pennsylvania, and Benjamin K. Miller, of the city and county of Milwaukee, in the State of Wisconsin, as sureties, are held and firmly bound unto Peter Brucker, of the county of Fond-du-Lac, in the State of Wisconsin, in the sum of three hundred dollars, to be paid to the said Peter Brucker, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated the thirty-first day of August, A. D. 1881.

Whereas the above-named Gibbs and Sterrett Manufacturing Company hath prosecuted a writ of error to the Supreme Court of the United States to recover a judgment rendered against it in the circuit court of the United States for the eastern district of Wisconsin, on the 26th day of July, 1881, in favor of said Peter Brucker, dismissing said suit, and for the sum of $60.04, costs of said defendant, in an action wherein said Gibbs and Sterrett Manufacturing Company was plaintiff and said Peter Brucker, impleaded, &c., was defendant.

40 Now, therefore, the condition of this obligation is such that if the above-named Gibbs and Sterrett Manufacturing Company shall prosecute its said writ of error to effect, and answer all damages and costs, and just damages for delay, and all costs and interest on the writ of error, if it fail to make its plea good, then

this obligation shall be void; otherwise the same shall be and remain in full force and effect.

GIBBS AND STERRETT
MANUFACTURING COMPANY.
By F. H. GIBBS. [SEAL.]
Its President and its Corporate Seal.
A. A. ASPINWALL. [L. S.]
B. K. MILLER. [L. S.]

Signed and sealed in presence of—
M. N. BAKER.

STATE OF PENNSYLVANIA, } ss:
Erie County, }

A. A. Aspinwall, being duly sworn, says he is one of the sureties in the above bond; that he resides in Carry, in said State of Pennsylvania, and is worth the sum of six hundred dollars in property in said State, not exempt from execution, and over and above all his debts and liabilities.

A. A. ASPINWALL.

Subscribed and sworn to before me, this 31 day of August, A. D. 1881.
[SEAL.] MARION N. BAKER, *Notary Public.*

41 Endorsed: This bond approved, this 5th September, 1881.
Chas. E. Dyer, judge.

Whereupon, it is ordered by the court that execution be suspended, and thereupon a writ of error and citation issued, and a copy of said writ of error lodged for the defendant in error.

42 UNITED STATES OF AMERICA, } ss:
Eastern District of Wisconsin, }

I, Edward Kurtz, clerk of the circuit court of the United States of America for the eastern district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate with their originals now on file and remaining of record in my office, and that they are true copies of such originals, and correct transcripts therefrom, being a full and complete transcript of the record and proceedings in the suit of Gibbs and Sterrett Manufacturing Company *vs.* Peter Brucker.

In testimony whereof, I have hereunto set my hand, and duly affixed the seal of the said court at the city of Milwaukee, in said district, this 15th day of September, in the year of Lord one thousand eight hundred and eighty-one, and of the Independence of the United States the 106th.

[SEAL.] EDWARD KURTZ, *Clerk.*

43 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States of America for the eastern district of Wisconsin, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court of the United States of America for the eastern district of Wisconsin, before you, between Gibbs and Sterrett Manufacturing Company, plaintiff, and Peter Brucker, defendant, a manifest error hath happened, to the great damage of the said Gibbs and Sterrett Manufacturing Company, as by the complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf. You are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next in the Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, that of right and according to law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 5th day of September, in the year of our Lord one thousand eight hundred and eighty-one, and of the Independence of the United States the 106th.

[SEAL.] EDWARD KURTZ,
Clerk U. S. Circuit Court, E. Dist. Wis.

Endorsed: Filed September 5, 1881. Edw. Kurtz, clerk.

44 THE UNITED STATES OF AMERICA, *ss:*

To Peter Brucker, Greeting:

[SEAL.] You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Wisconsin, wherein the Gibbs and Sterrett Manufacturing Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles E. Dyer, district judge of the United States for the eastern district of Wisconsin, at the city of Milwaukee, in the said district, this 5th day of September, A. D. 1881, and of the Independence of the United States the 106th.

CHAS. E. DYER, *U. S. Judge.*

I accept service of the above citation, this 15th day of September, A. D. 1881.

EDW'D S. BRAGG.
Att'y for Def't.

Endorsed on cover: E. Wisconsin C. C. U. S. No. 366. The Gibbs and Sterrett Manufacturing Company, plaintiff in error, *vs.* Peter Brucker. Filed 10th October, 1881.

111-577

SUPREME COURT U.S.
FILED
APR 8 1884
M. H. MARSHALL, CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 366.

THE GIBBS AND STERRETT MANUFACTURING COMPANY,
PLAINTIFF IN ERROR,

vs.

PETER BRUCKER.

PLAINTIFF'S BRIEF.

WM. P. LYNDE,
Counsel for Plaintiff in Error.

GOODIL, KANE & CRAIG, PRINTERS, MILWAUKEE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 366.

THE GIBBS AND STERRETT MANUFACTURING COMPANY, PLAINTIFF IN ERROR,

vs.

PETER BRUCKER.

PLAINTIFF'S BRIEF.

This case comes here on a certificate of division of opinion.

A stipulation was filed in the court below waiving a jury and that the cause be tried by the court.

The only question in the case is whether the contract sued upon was executed in violation of the Sunday laws of Wisconsin and by reason thereof invalid, as against the defendant Brucker.

The Revised Statutes of Wisconsin, of 1878, Sec. 4,595, provide as follows: "Any person who shall keep open his shop, warehouse or workhouse, or shall do any manner of labor, business or work, except only works of necessity and charity, or be present at any dancing or public diversion, show or entertainment, or take part in any sport, game or play, on the first day of the week, shall be punished by fine, not exceeding ten dollars; and such day shall be understood to include the time between the midnight preceding and the midnight following the said day, and no civil process shall be served or executed on said day."

Sec. 4596: "Any person who conscientiously believes that the seventh, or any other day of the week, ought to be observed as the Sabbath, and who actually refrains from secular business and labor on that day, may perform secular labor and business on the first day of the week, unless he shall wilfully disturb thereby some other person, or some religious assembly on said day."

The findings of fact and law are as follows (printed case, pp. 16, 17, 18 and 19):

First: That the plaintiff, at the time of and for more than three years next before the commencement of this action was, and had been, a manufacturing corporation, organized and existing under and by virtue of the laws of the State of Pennsylvania, with its home office at Corry, in said State last named, and having during all of

said time a western branch, or general agency, at the city of Chicago, in the State of Illinois.

Second: That on and previous to the 11th day of January, 1878, Messrs. Hoag & Conklin, of Waterloo, Wisconsin, were agents of said plaintiff in and for the State of Wisconsin, and so continued to be such agents until after January, 1878, for the purpose of effecting sales of the manufactured articles of said plaintiff (principally reapers and mowers), in the State of Wisconsin, through sub-agents, to be appointed in the following manner: *They, said Hoag and Conklin, were to canvass the State of Wisconsin for the purpose of selecting good and responsible men to become agents, and were to fill out in duplicate the said plaintiff's printed form of contract, a copy of which is set forth in the complaint in this action, and cause the same to be signed by men selected by them to act as such agents, and their sureties, and immediately thereafter to forward said duplicates to the plaintiff at its western branch, at Chicago, Illinois, for approval and signature of the said plaintiff; and that said Hoag & Conklin had no power or authority to sign or close any such contract on behalf of said plaintiff.*

Third: That during all the time from January 10th until January 25th, 1878, and after, *one M. V. Matteson was an employe and agent of said Hoag & Conklin, for the purpose of carrying out the aforesaid contract of Hoag & Conklin on their part*, and had and exercised no other or greater or different powers in that regard than had or did said Hoag & Conklin.

Fourth: That said *Hoag & Conklin were to be paid by the plaintiff*, by certain commissions upon the amount of machinery sold, *and that said Matteson was to be paid by said Hoag & Conklin*, by commissions upon the amount of machinery so sold through agencies established by his labors.

Fifth: That on the 11th day of January, 1878 (which was Friday), said Matteson filled out and procured to be signed by Gibson, Wirtz and Fox, the agency contract set forth in the complaint in this action. The instrument of guarantee at the foot thereof, upon which this action is brought, was then also filled out by said Matteson, and was by him required to be signed by their sureties, and the same was then, to-wit: on Friday, January 11th, signed by the surety, Pirmin Kœpfer, and the same so signed was delivered to said Peter Fox, on said 11th day of January, for the purpose of obtaining the signature thereto of Jacob Steffes as a surety. That on Sunday forenoon, January 13th, said contract and guaranty were returned by said Fox to said Wirtz, with the name of Jacob Steffes signed to said guarantee, and Wirtz thereupon exhibited the same, so signed and prefected (with the exception of the third surety), to said Matteson, said Wirtz retaining the same for the purpose of procuring the third surety.

Sixth: Thereafter, on said Sunday, January 13th, said defendant, Brucker, *at the request of said Wirtz*, signed said guaranty and delivered the same so signed, to said Wirtz, to be delivered to Matteson; and that Wirtz delivered said contract and guarantee *so* completed to Matteson, in the afternoon of the same Sunday, and that

Matteson knew that the guarantee was signed by the defendant, Brucker, on Sunday; and that Brucker, the defendant, then knew that Matteson was an agent, and was to take or send said contract and guaranty to Chicago.

Seventh: That said Wirtz, Gibson and Fox then knew that Matteson had no authority to sign or close such contract on behalf of the plaintiff, but that the same must be sent to the plaintiff at Chicago to be accepted and signed.

Eighth: That said defendant, Brucker, then had no knowledge that said contract and guaranty must be so sent to Chicago for acceptance or signing, and that he then had no actual knowledge as to what powers the agent Matteson had or was possessed of, and made no inquiry concerning the same.

Ninth: That said Matteson, at Fond du Lac, Wis., on Monday, January 14th, 1878, mailed the said duplicate contracts and guaranty so signed as aforesaid, to the plaintiff at Chicago, in a letter of that date, asking that the same be signed and accepted by the plaintiff.

Tenth: That said duplicate contracts and guaranty were received by the plaintiff, in Chicago, by due course of mail, and were accepted and signed by the plaintiff, in Chicago, on the 23d day of January, 1878, which was Wednesday, and that on the said 23d day of January, one of said duplicates, so signed by the plaintiff, was by mail returned to said Gibson, Wirtz and Fox, at Fond du Lac, Wisconsin, and was by them received at said last named place by due course of mail, and retained, but no communications were had between Brucker and the plaintiff on the subject.

Eleventh: That thereafter, during the spring and early part of summer of 1878, the plaintiff delivered to said Wirtz, Gibson and Fox upon said contract, a large number of reapers and mowers and other machinery, as stated in the complaint herein, and that default was made upon said contract by said Wirtz, Gibson and Fox, and the defendant, as stated in the complaint herein, in all which respects said complaint is true, and that there is now due to said plaintiff thereupon the sum of $3,336.25, with interest thereon at seven per cent. per annum, from and since March 14th, 1881, from said defendant Brucker, provided said guarantee contract is valid as against him.

Twelfth: That neither said plaintiff, nor any officer or agent thereof, excepting said Matteson, ever had notice or knowledge until after the signing of said contracts in Chicago, and until after the delivery of all of the said property thereupon as aforesaid to said Gibson, Wirtz and Fox, that said instrument of guaranty was signed so as aforesaid and delivered by said defendant Brucker, on the Lord's day.

The record further states that "upon the foregoing facts the following is the conclusion of law as established by the opinion of the circuit justice, who is opposed in opinion by the district judge, to-wit:

That said contract of guaranty and suretyship is void and invalid under and by virtue of the statutes of the State of Wisconsin, because the same was so signed and delivered by said defendant

Brucker, upon the Lord's day, and judgment is therefore ordered herein in favor of said defendant Brucker, with costs.

Upon the trial, and upon the facts aforesaid so found, a question arose as to whether the said contract of suretyship, so signed by said Brucker, was valid in law under the statutes of Wisconsin, and enforceable in this action against the defendant Brucker, he having so signed and delivered the same as aforesaid upon the Lord's day, upon which question the judges of this court were divided in opinion.

It is therefore, by request of both parties hereto, ordered that the said question be certified to the Supreme Court of the United States; that is to say, was and is the said guarantee contract valid, and effectual and enforceable, in this action against the said defendant Brucker, or is the same void as to him because so signed and delivered as aforesaid upon the Lord's day?

(Signed) JOHN M. HARLAN,
Circuit Justice.
CHARLES E. DYER,
Dated, July 26th, 1881." *Dist. Judge.*

ARGUMENT.

Duplicate contracts of agency, a copy of which is set forth in the complaint, were signed on the 11th of January, 1880, which was Friday, by James Gibson, John Wirtz and Peter Fox, of Fond du Lac, Wisconsin. At the foot of this contract was the following guarantee: "For value received, we hereby guarantee the fulfillment of the contract on the part of James Gibson, John Wirtz and Peter Fox, and hereby join them in each and every obligation therein contained. Fond du Lac, January 11th, 1878."

This contract of guarantee was signed at the procurement of Gibson, Wirtz and Fox, by Pirmin Kœpfer, Jacob Steffes and Peter Brucker. The duplicate contracts, after being signed by the parties and sureties as aforesaid, was to be sent to the plaintiff company in Chicago for acceptance and the signature of the company. They were so sent and accepted, and signed by plaintiff company on Wednesday the 23d of January. Until so accepted and signed by the plaintiff company there was no contract; neither party was bound. Brucker now claims that as to himself the contract is invalid, upon the ground that he signed it on Sunday. He knew the contract which he signed bore date the 11th of January, which was Friday; that it was to be sent to Chicago; that it was not yet signed by plaintiff company; yet he allows it to be sent for plaintiff's signature with the representation upon its face that he had signed on Friday, the 11th of January. The plaintiff company acted upon the papers as they appeared upon their face, and accepted of the contract and the sureties, and "neither said plaintiff, nor any officer or agent thereof, excepting said Matteson, ever had any notice or knowledge until

after signing of said contracts in Chicago, and until after the delivery of all of the said property thereupon as aforesaid to said Gibson, Wirtz and Fox, that said instrument of guarantee was signed so as aforesaid and delivered by said defendant Brucker, on the Lord's day."

Matteson was not an agent or sub-agent of plaintiff company in such a sense that notice to him was notice to the company. Hoag & Conklin were the parties and the only parties employed by plaintiff company "to canvass the State of Wisconsin for the purpose of selecting good and responsible men to become agents, and were to fill out in duplicate the said plaintiff's printed form of contract, a copy of which is set forth in the complaint in this action, and cause the same to be signed by the men selected by them to act as agents, and their sureties, and immediately thereafter to forward said duplicates to the plaintiff at its western branch, at Chicago, Illinois, for approval and signature of the said plaintiff, and the said Hoag & Conklin had no power or authority to sign or close any such contract on behalf of said plaintiff."

Matteson was an employe of Hoag & Conklin, to be paid by them, acting for them, merely; there was no privity between Matteson and plaintiff company, and he knew the plaintiff company only as the party who had contracted with his employers for the service which he had taken in part, under sub-contract, from them.

This court has said, in Hoover *vs.* Wise, 91 U. S. R., 311: "The rule of law is undoubted, that for the acts of a sub-agent the principal is liable, *but that for the acts of the agent of an intermediate, independent employe, he is not liable.*"

Certainly Hoag & Conklin were intermediate, independent employes, and they could employ, on their own responsibility, such persons to assist them as they pleased; the plaintiff company had nothing whatever to do with the selection or appointment of such persons.

We, therefore, say any knowledge which Matteson may have had as to Brucker having signed the contract of guarantee on Sunday, was not binding upon the company, unless communicated to some officer or agent of the company.

II.

We come now to the bald question: *Can a party who has signed a contract dated on a secular day, upon the faith of which the other party to the contract has acted, and parted with his property, be permitted to avoid liability upon the ground he, in fact, signed the contract on the Lord's day, when that fact was entirely unknown to the other party to the contract?* This would be making use of the statute which was intended to promote good morals, to perpetrate a monstrous fraud. We insist that the defendant in this case is estopped from setting up this defense.

It has been held that if a contract is commenced on Sunday, but not completed till a subsequent day, or if it merely grew out of a transaction which took place on Sunday, it is not for that reason void. Stockpole *vs.* Symonds, 3 Foster, 229; Adams *vs.* Gay, 19 Vt., 355; Goss *vs.* Whitney, 24 Vt., 187; Butler *vs.* Lee, 11 Alabama, 885; Bloxsome *vs.* Williams, 3 B. and C., 232. The case of Moseley *et al. vs.* Hatch, 108 Mass., 517, does not conflict at all with this principle, for in that case the agent had full authority, and the contract was made and completed on the Lord's day. In State *vs.* Young, 23 Minn., 560, the court say: "It is further urged that the bond in question is void because it was signed on Sunday. It will be noticed that although actually signed on Sunday, it bears date on Monday; that it was not delivered to or accepted by the board until Thursday; that when presented to and accepted by the board, they were not aware of the fact that it had been signed on Sunday. The mere statement of these facts is, we think, a sufficient answer to the point made by defendants. The objection is not well taken for two reasons."

"*First:* The sureties having, by their own act in dating the bond on Monday, represented to the board that it was in fact executed on that day, and they, in reliance upon that representation, have acted upon it, and accepted the bond, and allowed Young to enter upon the duties of his office, the sureties are now estopped from denying the truth of such representation, or showing that it was executed upon Sunday instead of the day it bears date."

"Bigelow on Estoppels, 480 *et seq.;* Vinton *vs.* Peck, 14 Mich., 289.

Second: It is almost an elementary principle, laid down in all the books, that a bond is not "executed" until it is delivered, for delivery is the essence of a deed. It takes effect only from execution, on delivery, and until delivery it is not a contract, and of no further value than the paper upon which it is written. This bond not having been delivered until the following Thursday, the mere signing of it on Sunday does not affect its validity. In the proper and legal sense of the term, it was not "executed" on Sunday, but on Thursday, Com. *vs.* Kendig, 2 Penn. St., 448; Bloxsome *vs.* Williams, 3 B. and C., 232; Lovejoy *vs.* Whipple, 18 Vt., 379; Clough *vs.* Davis, 9 N. H., 500; Hill *vs.* Dunham, 7 Gray, 543; Pierce *vs.* Richardson, 37 N. H., 306. The fact that everything that was done by the sureties in reference to the bond was done on Sunday, does not affect the validity of the implied authority to the board to fill the blank. This authority was implied from a continuing state of facts, which still continued to exist on the day when the board filled the blank and accepted the bond. Therefore the original authority was renewed or continued on each succeeding secular day on which such state of facts was permitted by the sureties to continue to exist."

In Hall *vs.* Tucker, 37 Mich., 593, Judge Graves, in delivering the opinion of the court, says:

"Evidence was offered to show that the other bond, though dated and filed on a business day, and apparently executed and caused to take effect on that day, was in fact signed by Geiger on Sunday. Objection being made, the evidence was excluded. This ruling was cor-

rect. The bond was given under an order of the court in a pending cause, and by means of it the principal was enabled to keep his cause in court and prosecute it to judgment. It was fair on its face, and afforded no hint that it had been signed on Sunday. There was nothing whatever to suggest to the court or the obligees anything of the kind. It was relied on as a bond which had been executed according to its import. It could not take effect from the signing, but only from delivery or filing. This took place on a business day. Love *vs.* Wells, 25 Ind., 503; Beitenman's Appeal, 55 Penn. St., 183; Flanagan *vs.* Meyer, 41 Ala., 132."

"It has been held that a note is not impaired on account of being signed on Sunday, if it be not delivered on that day. Hilton *vs.* Houghton, 35 Me., 143; Lovejoy *vs.* Whipple, 18 Vt., 379; Com. *vs.* Kendig, 2 Penn. St., 448; Clough *vs.* Davis, 9 N. H., 500; Hill *vs.* Dunham, 7 Gray, 543; Adams *vs.* Gay, 19 Vt., 358; see also Stockpole *vs.* Symonds, 23 N. H., 229, and Vinton *vs.* Peck, 14 Mich., 287; and the court in Com. *vs.* Kendig, *supra*, decided that an official bond executed on Sunday is not void as to the parties to be protected by it. See, also, 2 Par. on Con., 757 to 765, and note."

"As this paper was framed, dated, signed and filed as a bond, executed on a week day; as it was received by the court as such a bond, and as the obligee who relied upon it had no notice or intimation that either signature had been put to it on Sunday, and as it was actually made to take effect on a week day, the circumstance that the act of signing occurred on Sunday, could not be allowed to invalidate the instrument."

In Hilton *vs.* Houghton, 35 Me., 143, which was a suit by the payee against the maker and sureties upon a promissory note, Shepley, C. J., in delivering the opinion of the court, says: "The first objection made to a recovery is, that it was made on the Lord's day. It appears to have been written and the defendants' names to have been subscribed to it on that day, when the plaintiff was not present, and to have been afterwards delivered to him on a week day, when he delivered up another note in exchange for it."

"The statute, chap. 160, sec. 26, declares it to be unlawful to "do any work, labor or business" on the Lord's day. The note did not become a valid contract or a part of the business transacted until it was delivered. The plaintiff does not appear to have been a party to the execution of it on the Lord's day. The objection cannot prevail, citing Bloxsome *vs.* Williams, 3 B. and C., 232."

In conclusion, we respectfully submit that the said guarantee contract was and is valid and effectual and enforceable in this action against the said defendant, Brucker, and that the same is not void as to him because so signed and delivered, as aforesaid, upon the Lord's day.

WM. P. LYNDE,

Counsel for Plaintiff in Error.

111-557

OFFICE SUPREME COURT U. S.
FILED
APR 15 1884
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1883.

No. 366.

THE GIBBS & STERRETT MANUFACTURING COMPANY,
Plaintiff in Error,
vs.
PETER BRUCKER,
Defendant in Error.

Brief and Argument for Defendant in Error.

EDWARD S. BRAGG,
Attorney of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1883.—No. 366.

GIBBS & STERRETT MANUFACTURING COMPANY, *Plaintiff in Error,*

vs.

PETER BRUCKER, *Defendant in Error.*

ABSTRACT OF RECORD.

The plaintiff in error brought an action in *assumpsit* against the defendant in error, in the Circuit Court, for the Eastern District of Wisconsin, on the 29th day of December, 1879, and counted upon a contract ing dated January 11, 1878, by the plaintiff, with certain persons named James Gibson, John Wirtz, and Peter Fox, of the county of Fond du Lac, in the State of Wisconsin, and appointing such persons for the season of 1878 agents for the sale of "Climax Reapers and Mowers" in certain territory in the State of Wisconsin, described in such contract, upon terms and conditions specifically stated in such contract and set out in said Count.

(See printed record, pages 3 to 6.)

And averred that such contract was accompanied with the following agreement of guaranty endorsed thereon in writing, to-wit: "For value received we "hereby guaranty the fulfillment of the contract on "the part of James Gibson, John Wirtz, and Peter Fox, "and hereby join them in each and every obligation "therein contained."

(Signed) PIRMIN KOPFER,
JACOB STEFFES,
PETER BRUCKER.

Fond du Lac, Jan. 11, 1878.

And that such agreement, first stated, was negotiated by one Matteson, a special agent of the plaintiff, but who had no power or authority to close or conclude the same.

* * * * * *

That said Gibson, Wirtz, and Fox were required by said agent to furnish and give three sureties to the said plaintiff, as a condition of the acceptance of the proposed contract by said plaintiff, and to that end and for that purpose, the defendant in error, together with one Jacob Steffes, now deceased, and one Permin Kopfer, who was joined in the action as defendant, executed the guaranty aforesaid. * * * *

That such guaranty was afterwards delivered by the defendant to the plaintiff, and the plaintiff afterwards accepted said guaranty and ratified and concluded said contract, and on the 23d day of January, 1879, delivered a duplicate thereof signed by the plaintiff, to Gibson, Wirtz, and Fox.

(See printed record, pages 6 and 7.)

The complaint alleges the delivery under said contract to Gibson, Wirtz and Fox, of a large number of "Climax Reapers and Mowers," to be sold and accounted for under said contract, by them, of the value of $7,379.10, and avers sale and conversion of the proceeds by said Gibson, Wirtz, and Fox, and a non-performance generally, by them, of the said contract, whereby the plaintiff suffered damages to the amount of $4,664.49, and then avers notice to the defendant and a demand of fulfillment, etc., and non-performance on his part, concluding with a prayer for judgment for the damages so sustained, etc.

(See printed record, pages 7–10.)

The defendant among other defences, interposed the following:

"And for a second and further answer the defe
"alleges * * * that the supposed
"contract in the plaintiff's complaint was signed and
"delivered by James Gibson, John Wirtz, and Peter
"Fox, and became in full force so far as it might
"become in force as to them, upon the 11th
"January, 1878, and not upon the 23d day of Ja ---y,
"1878, as is in said complaint stated and alleged.
"And this defendant admits he signed the guaranty
"upon the back thereof, but he signed the same, and
"so far as he was connected therewith delivered the
"same upon the day of the week commonly called
"Sunday, and that he never at any time thereafter re-
"delivered the same, or acknowledged the binding
"effect thereof upon him, and that the said supposed
"corporation well knew when the said paper was re-
"ceived that the same was executed and delivered on
"Sunday, and was null and of no force and effect, by
"reason thereof, upon this defendant."

s of Fact.

(See printed record, pages 11–12.)

And afterwards, at the July special term, 1881, before the Hon. John M. Harlan, Associate Justice Supreme Court of the United States, and the Hon. Chas. E. Dyer, District Judge, the following proceedings were had:

The counsel for the parties filed the following agreement on the 26th day of July, 1881, signed by them:

"It is hereby stipulated that a jury be waived herein
"and that this cause be tried before the Court at this
"July term, without further notice."

Stipu
in

And the said issue was thereupon tried by the Court and submitted:

Tria

The Court find the issues for the defendant and thereupon judgment was entered and perfected

judgment roll was signed on the same day, July 26, 1881.

(See printed record, page 16.)

The facts found are as follows:

That the plaintiff was a corporation with capacity to bring the action, having a home office at Corry, Pa., and with a western branch at Chicago.

2d. That on and previous to the 11th day of January, 1878, Messrs. Hoag & Conklin, of Waterloo, Wisconsin, were agents for the plaintiff in and for the State of Wisconsin, and continued so to be until after January, 1878, for the purpose of effecting sales of the manufactured articles of the said plaintiff * * * * * * through sub-agents to be appointed in the following manner: Said Hoag & Conklin were to canvass the State of Wisconsin for * * * men to become agents, and were to fill out in duplicate plaintiff's form of contract * * * and cause the same to be signed by the men selected by them to act as such agents and their sureties * * and to forward said duplicates to the plaintiff * * at Chicago, Illinois, for approval and signature of the said plaintiff, and that said Hoag & Conklin had no power or authority to sign or close any such contract on behalf of said plaintiff.

3d. That * * from January 10 until January 25, 1878, one M. V. Matteson was an employee and agent of said Hoag & Conklin for the purpose of carrying out the aforesaid contract of Hoag & Conklin on their part. * * * * * *

4th. * * * * * *

5th. That on the 11th day of January, 1878, which was Friday, said Matteson filled out and procured to be signed by Gibson, Wirtz, and Fox, the agency contract set forth in the complaint in this action; the instru-

ment of guaranty at the foot thereof, upon which this action is brought, was then also filled out by said Matteson and was by him required to be signed by three sureties, and the same was there, to-wit: on Friday, January 11th, signed by the surety Pirmin Koepfer, and the same so signed was delivered to said Peter Fox on said 11th day of January, for the purpose of obtaining the signature thereto of Jacob Steffes as a surety. That on Sunday forenoon, January 13th, said contract and guaranty were returned by said Fox to said Wirtz, with the name of Jacob Steffes signed to said guaranty; and Wirtz thereupon exhibited the same, so signed and perfected, (with the exception of the third surety), to said Matteson, said Wirtz retaining the same for the purpose of procuring the third surety.

6th. Thereafter, on said Sunday, January 13th, said defendant Brucker, at the request of said Wirtz, signed said guaranty and delivered the same, so signed, to said Wirtz, to be delivered to Matteson; and that Wirtz delivered said contract and guaranty so completed to Matteson in the afternoon of the same Sunday; and that Matteson knew the guaranty was signed by defendant Brucker on Sunday; and that Brucker the defendant then knew that Matteson was an agent, and was to take or send said contract and guaranty to Chicago.

7th. * * * * * *

8th. That said defendant Brucker had no kn- SION OF that said contract and guaranty must be sent cago for acceptance or signing, and that he then had no actual knowledge as to what powers the agent Matteson had or was possessed of, and made no enquiry concerning the same.

9th. That said Matteson, at Fond du Lac, te of Di- Monday January 14th, 1878, mailed the said duplicate

contract and guaranty so signed, as aforesaid, to the plaintiff at Chicago, in a letter of that date, asking that the same be signed and accepted by the plaintiff.

10th. That said duplicate contracts and guaranty were received by the plaintiff in Chicago by due course of mail, and were accepted and signed by the plaintiff in Chicago on the 23d day of January, 1878, which was Wednesday; and that on said 23d day of January, one of said duplicates so signed by the plaintiff was returned to said Gibson, Wirtz & Fox, at Fond du Lac, and was by them received in due course of mail, and retained, *but no communications were had between Brucker and the plaintiff upon the subject.*

11th. That the plaintiff delivered to Gibson, Wirtz & Fox, upon said contract, in 1878, a large number of reapers and mowers as alleged in the complaint; that default was made by Gibson, Wirtz & Fox as stated in the complaint, and that there is due the plaintiff the sum of $3,336.25 with interest at 7 per cent. from and since March 14, 1881, from said defendant Brucker, provided said guaranty contract is valid against him.

12th. * * * * * *

* * * * * * *

The following is the conclusion of law established by the opinion of the Circuit Justice (who is opposed in opinion by the District Judge) to-wit:

That said contract of guaranty and suretyship is void and invalid under and by virtue of the statute of the State of Wisconsin, because the same was so signed and delivered by said defendant Brucker upon the Lord's day, and judgment is therefore ordered herein in favor of said defendant Brucker, with costs.

Upon the trial, and upon the facts aforesaid so found, a question arose as to whether the said contract of suretyship so signed by said Brucker was valid in law

under the statute of Wisconsin, and enforceable in this action against the defendant Brucker, he having so signed and delivered the same as aforesaid upon the Lord's day; upon which question the Judges of this Court were divided in opinion.

It is, therefore, by request of both parties he dered that the said question be certified to the S Court of the U. S.; that is to say: "Was, and is, the said guaranty contract valid and effectual and enforceable in this action against the said defendant Brucker, or is the same void as to him because so signed and delivered, as aforesaid, upon the Lord's day?"

JOHN M. HARLAN, Circuit Justice,
CHAS. E. DYER, District Judge.

Dated July 26, 1881.

(See printed record, pages 16, 17, 18, 19.)

Upon this record the defendant in error makes the following points and cites his authorities in support of the same.

POINTS AND BRIEF FOR DEFENDANT IN ERROR.

I.

Where a contract grows out of an illegal or immoral act a Court of Justice will not lend its aid to enforce it.

This proposition is sustained by an unbroken line of authorities, of which it will suffice to cite:

Armstrong vs. Toler, 11 Wheaton, 256.
Coppell vs. Hall, 7 Wallace, 543.

Mr. Justice Swayne, in delivering the opinion of the Court in Coppell vs. Hall, uses the following strong language:

"The defence is allowed, not for the sake of the de-
"fendant, but of the law itself. The principle is in-
"dispensable to the purity of its administration. It
"will not enforce what it has forbidden and denounced.

"The maxim, *ex dolo malo non oritur actio*, is limited by "no such qualification."

The plaintiff's case rests upon a guaranty made and delivered by the defendant on Sunday. (See finding of the Court numbered 6, on page 17 of the printed record.)

There was no fraud or deception practiced by the defendant; the agent of the plaintiff received the guaranty on Sunday, and knew it was signed by the defendant on Sunday.

(See finding number 6, page 17, *cited supra.*)

There never was any subsequent delivery or ratification by the defendant, for the Court find "no communications were had between Brucker and the plaintiff on the subject."

(See finding number 11, printed record, page 18.)

If the delivery proven on Sunday to the plaintiff's agent was not a delivery, then there never was a delivery.

The ratification by the plaintiff on a subsequent day, without communication with the defendant, if it has any place in the consideration of the question, will relate back to the date of its delivery by the defendant to the plaintiff's agent, Matteson, on Sunday, January 13th, 1878.

The guaranty was completed on Sunday, although the contract of agency between the plaintiff and Gibson, Wirtz & Fox, may not have been fully completed until January 23d.

The Supreme Court of Massachusetts have so held in a case directly in point.

Merriam vs. Stearns, 10 Cushing, 257.

The signing and delivery of the guaranty upon Sunday is prohibited by the statutes of Wisconsin.

As early as the Revised Statutes of 1849 it was enacted:

"No person shall keep open his shop, ware-house, or "work-house, or shall do any manner of labor or busi- "ness or work, except only works of necessity or char- "ity, or be present at any dancing, or any public diver- "sion, show, or entertainment, or take part in any "sport, game or play on the Lord's day, commonly "called Sunday; and every person so offending shall "be punished by a fine not exceeding two dollars for "each offence."

Revised Statutes of Wisconsin 1849, Ch. 139, § 21.

The same provision is found in the Revised Statutes of 1858, which were in force when the guaranty sought to be recovered upon was made.

Revised Statutes of Wis., 1858, Ch. 183, § 5.

And is continued in the revision of 1878, with a single change making the penalty "not to exceed ten dollars."

Revised Statutes of Wis., 1878, Ch. 186, § 4595.

An act forbidden by law under a penalty, like the giving of a promissory note, made while the statute was in force, was held by the Supreme Court of Massachusetts, to be void.

Springfield Bank vs. Merrick, 14 Mass., 321.

And the case is cited with approval by this Court.

See the opinion of the Court by Ch. J. Marshall in Craig vs. State of Missouri, 4 Peters, 436.

It has been uniformly held by the Court of last resort in the State of Wisconsin, under these statutes, that a note or contract given or entered into upon Sunday was void, and the Courts would not enforce the same.

Moore vs. Kendall, 2 Pinney, 99.